

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

STATE OF DELAWARE,	)	
	)	
v.	)	I.D. No. 1601011422
	)	
BRIAN LIVINGSTON,	)	
	)	
Defendant.	)	

Date Submitted: May 11, 2022

Date Decided: July 5, 2022

Date Corrected: July 8, 2022<sup>1</sup>

**ORDER DENYING DEFENDANT’S MOTION FOR MODIFICATION**

Upon consideration of Defendant Brian Livingston’s Motion for Modification (“Motion”)<sup>2</sup> pursuant to Superior Court Criminal Rule 35; the State’s Response thereto;<sup>3</sup> and the record in this case, the Court makes the following findings:

1. On September 14, 2016, Defendant pled guilty to Manslaughter, Robbery Second Degree, and Conspiracy Second Degree.<sup>4</sup> In pleading guilty, Defendant admitted to recklessly causing the death of Everardo Martinez by stabbing him with a knife.<sup>5</sup>

2. Defendant was sentenced to 12 years at Level 5 with transitioning levels

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<sup>1</sup> Corrected to reflect the motion is **DENIED**.

<sup>2</sup> D.I. 23.

<sup>3</sup> D.I. 26.

<sup>4</sup> D.I. 5.

<sup>5</sup> D.I. 2.

of probation.<sup>6</sup>

3. Since sentencing, Defendant has filed two motions pursuant to Superior Court Criminal Rule 35 and one filed pursuant to 11 *Del. C.* §4204A. All three were denied.<sup>7</sup> Defendant filed the instant Rule 35(b) motion on March 14, 2022.<sup>8</sup>

4. In his latest Motion, Defendant asks the Court to reduce his 12-year period of incarceration to 9 years.<sup>9</sup> Defendant essentially asks the Court to impose a longer probation in lieu of Level 5 incarceration.<sup>10</sup> Defendant argues the modification is warranted based on the following grounds: (1) his growth and development while incarcerated; (2) his belief that a “[psychological] forensic eval[uation] with risk assessment report” will reveal the “growth and development transitions of maturation throughout his years of incarceration”; (3) his refrain from

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<sup>6</sup> D.I. 12. Defendant was sentenced on March 24, 2017, effective January 17, 2016, as follows: (1) as to Manslaughter, N16-09-0164-I, 25 years at Level 5, suspended after serving 12 years at Level 5, for 13 years at Level 4 Work Release, suspended after 9 months at Level 4 Work Release, for 2 years at Level 3, hold at Level 5 until space is available at Level 4 Work Release — the first 2 years of this sentence is a mandatory term; (2) as to Robbery Second, N16-09-0165-I, 5 years at Level 5, suspended for 18 months at Level 3 — probation is concurrent to criminal action number N16-09-0164-I; and (3) as to Conspiracy Second, N16-09-0166-I, 2 years at Level 5, suspended for 18 months at Level 3 — probation is concurrent to criminal action number N16-09-0165-I.<sup>6</sup>

<sup>7</sup> See D.I. 13 (timely Rule 35(b) motion denied by the Court on the merits); see also D.I. 17 (Rule 35(a) motion denied due to Defendant’s failure at the time to meet the time-served eligibility requirements set forth in 11 *Del. C.* §4204A); see also D.I. 19 (Motion for Modification/Review of Juvenile Sentence denied pursuant to 11 *Del. C.* §4204A’s requirement that “at least 5 years have elapsed since the date on which the Court ruled upon the offender’s most recent position”).

<sup>8</sup> D.I. 23. Although not made explicit by the Motion itself, the Court construes Defendant’s Motion as a Rule 35(b) motion for modification of sentence, as does the State. See D.I. 26 (“While not cited in his filing, the substance of the motion for modification of sentence reflects an application made pursuant to Superior Court Criminal Rule 35(b).”).

<sup>9</sup> D.I. 23.

<sup>10</sup> See *id.* Defendant also asks for Level 4 Home Confinement in lieu of Level 4 Work Release.

“irritating the Court” with countless motions for modification; (4) “good cause,” including rehabilitative measures undertaken by Defendant while in custody; and (5) his lack of criminal history prior to his current convictions.<sup>11</sup>

5. The State filed its response in opposition to Defendant’s Motion on May 16, 2022.<sup>12</sup> The State argues that Defendant’s Motion should be denied based on it being untimely, repetitive, and substantively deficient.<sup>13</sup>

### **Defendant’s Motion is Repetitive and Therefore Time-Barred**

6. Rule 35(b) mandates that “[t]he [C]ourt *will not* consider repetitive requests for reduction of sentence.”<sup>14</sup> “[T]his bar is absolute and flatly ‘prohibits repetitive requests for reduction of sentence.’”<sup>15</sup> “As our Supreme Court and this Court have consistently held, Rule 35(b) prohibits consideration when the request is for sentence reduction, modification of a term of partial confinement, or

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<sup>11</sup> D.I. 23.

<sup>12</sup> D.I. 26.

<sup>13</sup> *Id.* at \*2-3.

<sup>14</sup> Super. Ct. Crim. R. 35(b). Unlike the 90 day jurisdictional limit with its “extraordinary circumstances” exception, the bar to repetitive motions has no exception. *See Redden*, 111 A.3d, at 608 (citing *Giuricich v. Emtrol Corp.*, 449 A.2d 232, 238 (Del.1982) (“[W]here a provision is expressly included in one section of a statute, but is omitted from another, it is reasonable to assume that the Legislature was aware of the omission and intended it.”); *see also Adoption of Swanson*, 623 A.2d 1095, 1097 (Del.1993) (citing *Giuricich*, 449 A.2d at 238) (“A court may not engraft upon a statute language which has been clearly excluded therefrom.”)).

<sup>15</sup> *Redden*, 111 A.3d, at 609 (quoting *Thomas v. State*, 2002 WL 31681804, at \*1 (Del. Nov. 25, 2002). *See also Jenkins v. State*, 2008 WL 2721536, at \*1 (Del. July 14, 2008) (Rule 35(b) “prohibits the filing of repetitive sentence reduction motions”); *Morrison v. State*, 2004 WL 716773, at \*2 (Del. Mar. 24, 2004) (“motion was repetitive, which also precluded its consideration by the Superior Court”); *Duffy v. State*, 1998 WL 985332, at \*1 (Del. Nov. 12, 1998) (as court had denied original, timely Rule 35(b) motion, “Rule 35(b) ceased to be a viable option” for seeking sentence reduction)).

probation.”<sup>16</sup> The bar to repetitive motions has no exception.<sup>17</sup> This is Defendant’s third Rule 35 motion.<sup>18</sup> Rule 35(b) prohibits consideration of Defendant’s Motion.

**NOW, THEREFORE, IT IS HEREBY ORDERED** that Defendant’s Motion for Modification is **DENIED**.

/s/ Jan R. Jurden  
Jan R. Jurden, President Judge

cc: Original to Prothonotary  
Brian J. Robertson, DAG  
Brian Livingston (SBI# 00741658)

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<sup>16</sup> See *Teat v. State*, 2011 WL 4839042, at \*1 (Del. Oct. 12, 2011); *State v. Bennett*, 2015 WL 1746239, at \*2 (Del. Super. Apr. 13, 2015); *State v. Weidlow*, 2015 WL 1142583, at \*1–2 (Del. Super. Mar. 11, 2015).

<sup>17</sup> See *Culp*, 152 A.3d at 144; *State v. Redden*, 111 A.3d 602, 608–09 (Del. Super. 2015).

<sup>18</sup> See *supra* note 7; see also D.I. 26 (“ . . . the present motion constitutes Mr. Livingston’s third motion for reduction of sentence.”).